ST 99-13
Tax Type: Sales Tax
Issue: Interstate Commerce (Exemption Issue)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS v. **"BUTLER UNIVERSAL BOAT & BARGE ASSOCIATION, INC.",** Taxpayer	Case No. 96 ST 0000 IBT No. 0000-0000 Administrative Law Judge Mary Gilhooly Japlon

RECOMMENDATION FOR DISPOSITION

Appearances: Sachnoff & Weaver, Ltd., by Mr. Clifford Shapiro and Mr. Henry Pietrkowski, on behalf of "Butler Universal Boat & Barge Assn. Inc."; Special Assistant Attorney General Mark Dyckman on behalf of the Illinois Department of Revenue.

SYNOPSIS:

This matter comes on for hearing pursuant to the timely protest by "Butler Universal Boat & Barge Association, Inc." (hereinafter “BUBBA” or “taxpayer”) of Notice of Tax Liability (“NTL”) Nos. SF-190000000000000 and SF-190000000000001 issued to the taxpayer on September 11, 1995, covering the periods of January 1992 through November 1993, and December 1993 through March 1995, respectively. At issue is whether "BUBBA'S" Illinois sales of fuel are exempt from taxation under the “rivers bordering” exemption of the Retailers’ Occupation Tax (“ROT”) Act, and the

Department's corresponding regulation. Also at issue is whether the Department issued a Private Letter Ruling ("PLR") to "BUBBA" during the period 1961 through 1966 that exempted the taxpayer from having to pay taxes under the ROT Act for sales of fuel in Illinois, and whether the PLR is binding on the Department if it was issued. Testifying on behalf of the taxpayer were Ms. "Elizabeth Borden", Mr. Richard J. Short, Mr. Michael Juricek, Mr. "James Fenimore Cooper", Mr. "Horatio Hornblower" and Mr. George Sorensen. Mr. Sorenson also testified as a rebuttal witness for the Department.

Following a review of all evidence elicited at hearing, as well as of the pleadings filed herein, it is recommended that this matter be resolved in favor of the Department of Revenue.

FINDINGS OF FACT:

1. The Department's prima facie case, inclusive of all jurisdictional elements, was established by the admission into evidence of a certified copy of the Audit Correction and/or Determination of Tax Due (prior to 12/93), showing a liability due and owing under section 5 of the Retailers' Occupation Tax Act in the amount of $188,043 for tax delinquencies for the period of January 1, 1992 through November 30, 1993. (Dept. Group Ex. No. 1; Tr. p. 12).
2. In addition to the foregoing, the Department's prima facie case was established by the admission into evidence of a certified copy of the Audit Correction and/or Determination of Tax Due (from 12/93) for the period of December 1, 1993 through March 31, 1995, showing Retailers' Occupation Tax liability in the amount of $155,019. (Dept. Group Ex. No. 1; Tr. p. 12).

3. "Butler Universal Boat & Barge Association". has been in business since 1963. (Tr. p. 17).
4. The taxpayer supplies fuel to the fleets of the Great Lakes. (Tr. p. 14).
5. The taxpayer delivers fuel to purchasers' ships or vessels while such vessels are afloat on waters. (Taxpayer's Ex. No. 53, par. 12).
6. The taxpayer operates a marine lightering tanker. (Tr. p. 14).
7. A lighterer is a tanker that supplies or transfers fuel from one vessel to another vessel. (Tr. p. 14).
8. The taxpayer sells two grades of fuel: main diesel fuel (number 2) and fuel oil (number 6). (Tr. p. 14).
9. The taxpayer does not supply fuel to vessels while the vessels are underway. (Tr. p. 15).
10. During the audit period the taxpayer sold fuel in Illinois to ships or vessels that were engaged in interstate commerce. (Agreement and Stipulation of the Parties).
11. During the tax years at issue, the taxpayer made sales of fuel at various ports on Lake Michigan, including the Port of Chicago, which is the Calumet Harbor in Lake Calumet. (Tr. p. 26).
12. "BUBBA" sold fuel to ships at the Port of Chicago when the company was first in operation in the 1960's, as well as during the taxable period. (Tr. p. 26).
13. Approximately 65 percent of taxpayer's sales of fuel during the taxable period were made at the Federal Marine dock. (Tr. pp. 27-28; Taxpayer Ex. No. 44).

14. Other docks at which sales of fuel were made during the taxable period include the KCBX, Marble Head, ACME, Medussa Cement, and Continental Grain terminals. (Tr. pp. 28-30).

15. The taxpayer's current president, "Elizabeth Borden", personally became involved with "BUBBA" on a part-time basis in the early 1980's when she was a college student. (Tr. p. 19).

16. At that time, Ms. "Borden's" father was president of the company. (Tr. p. 19).

17. In 1983, Ms. "Borden" became a full-time employee of "BUBBA"; in 1987 she became president of the company when her father passed away. (Tr. p. 20).

18. It was the taxpayer's assumption through the years that their sales of fuel were exempt from taxation because fuel was sold on the Great Lakes to ships involved in interstate commerce. (Tr. p. 45).

19. The taxpayer located Richard J. Short, former employee of the Department of Revenue, in an attempt to establish the existence of a Private Letter Ruling allegedly issued to the taxpayer years ago. (Tr. pp. 52-54).

20. Richard Short is an attorney and was employed by the Department of Revenue from 1961 through 1966. (Tr. pp. 65, 67; Taxpayer's Ex. No. 53, par. 1).

21. Mr. Short started out as a technical advisor in the Rules and Regulations section of the Department; in approximately 1965 he was promoted to Supervisor of Rules and Regulations of the Chicago office. (Tr. pp. 69-70).[1]

[1] It is unclear how long Mr. Short was the Supervisor of Rules and Regulations. He testified that he was promoted to that position in 1965, and that he left the Department's employ in early 1967 (Tr. p. 68). However, at a later point in his testimony, he stated that he held the position for three or four years, which would be subsequent to his departure date. (Tr. p. 70).

22. As Supervisor of Rules and Regulations, Mr. Short supervised a staff of about 10 to 12 attorneys who worked on issuing private letter rulings. (Tr. p. 71).

23. Staff attorneys prepared draft private letter rulings, but they were edited and signed by Mr. Short. (Tr. pp. 71-72).

24. Mr. Short was an administrative assistant to Director of Revenue Marshall Korshak at the same time he was Supervisor of Rules and Regulations of the Chicago office. (Tr. p. 72).[2]

25. Mr. Short specifically recalls writing and signing a private letter ruling in response to an inquiry from taxpayer in the usual format of private letter rulings; the facts as stated by the taxpayer were recited, then the pertinent rule, regulation or case law was recited, and lastly the exemption would be granted or denied, with a rationale provided. (Tr. pp. 75, 78, 81).

26. According to Mr. Short, the letter ruling determined that the taxpayer's transactions were exempt. (Tr. p. 78).

27. According to Mr. Short, the primary basis for the exemption set forth in the letter ruling was interstate commerce. (Tr. pp. 77-78).

28. The audit that resulted in the assessment at issue was generated by an audit referral that resulted after the audit of another company that sold fuel from an on shore tanker to ships afloat on waters that are part of Lake Calumet. (Tr. pp. 98-99, 101, 127).

29. The Department determined in the audit of the other taxpayer that sales of fuel to ships afloat on the Calumet River were not exempt because that river is not a river bordering Illinois. (Tr. pp. 363, 385).

[2] It is also unclear whether Mr. Short was the First Administrative Assistant under Director Korshak (Tr. p. 69), or the Second Administrative Assistant (Tr. p. 72).

30. That company protested the assessment that was generated against it, and paid the liability. (Tr. pp. 100-101).
31. Prior to the audit of the aforementioned taxpayer, the issue of whether sales of fuel on the Calumet River were exempt had not arisen.
32. The Department issued Private Letter Ruling No. 85-0149 dated February 6, 1985; said letter ruling was never revoked by the Department, nor has an inconsistent letter ruling been issued. (Taxpayer's Ex. Nos. 4, 23, 53, pars. 15 and 17; Tr. pp. 276, 278, 316-317).
33. The Department issued an unnumbered Private Letter Ruling dated July 19, 1974; said letter ruling was never revoked. (Taxpayer's Ex. No. 3, 53, pars. 18 and 20; Tr. pp. 276, 278).
34. The Department never considered the 1974 or the 1985 Private Letter Rulings in connection with the audit of the other taxpayer. (Tr. p. 103).
35. The Department never considered whether the Calumet River was part of Lake Michigan in connection with the audit of the other taxpayer. (Tr. p. 104).
36. The Department issued an assessment to the other taxpayer because the sales of fuel took place on the Calumet River. (Tr. pp. 136, 137).
37. During the course of the audit of "BUBBA", the Department determined that based upon the facts, the taxpayer's sales of fuel were taxable. (Tr. pp. 117, 126).
38. "BUBBA's" sales of fuel were deemed taxable because the fuel was sold to ships afloat on the Calumet River. (Tr. p. 122).
39. The so-called "rivers bordering" exemption was enacted in order to avoid factual and jurisdictional disputes as to which state a vessel was in when fueling on a bordering

river, and to therefore avoid the possibility of multistate taxation. (Taxpayer' Ex. No. 54, par. 17; Tr. p. 285; Taxpayer's Ex. No. 23).

40. It provided an exemption from taxation for sales of fuel sold to interstate carriers for hire on the borders of rivers in the State of Illinois. (Tr. p. 149).

41. The purpose of the exemption was to avoid any violation of the commerce clause by exempting from taxation property that would be moving in interstate commerce. (Tr. p. 148).

42. In addition, by exempting certain transactions, Illinois retailers are protected from competition by out-of-state retailers selling to Illinois residents. (Tr. p. 148).

43. In an instance wherein there's a conflict between the Department's regulations and a Private Letter Ruling, the regulation reflects the Department's policy. (Tr. p. 168).

44. Letter Rulings must have statutory and regulatory authority. (Tr. pp. 169, 174).

45. The unnumbered private letter ruling issued July 19, 1974 provides an exemption for fuel sold for use and delivered to a ship while it is afloat on waters (including Lake Michigan) bordering Illinois. (Taxpayer's Ex. No. 3; Tr. p. 308).

46. The 1974 letter ruling considers both Navy Pier and Calumet Harbor as being part of Lake Michigan for purposes of the exemption at issue. (Taxpayer's Ex. No. 3; Tr. pp. 311, 379).

47. Private Letter Ruling No. 85-0149 issued February 6, 1985 likewise expands the exemption to sales of fuel to ships afloat on the Great Lakes. (Tr. pp. 153, 316, 332; Taxpayer's Ex. No. 4).

48. The 1985 letter ruling was based upon the 1974 letter ruling. (Tr. p. 317).

49. When Director, Mr. Johnson never issued an informational bulletin regarding the 1985 letter ruling, nor did he convene any interdepartmental policy group with respect to the letter ruling. (Tr. p. 168).
50. Mr. Johnson never discussed the drafting of the 1985 letter ruling with the attorney who drafted and signed it, Archie Lawrence. (Tr. p. 166).
51. Nor did Mr. Johnson discuss the 1985 letter ruling with either George Sorenson, or Stan Cichowski, the head of the legal section during the time the 1985 letter ruling was issued. (Tr. p. 166).
52. Even though the 1985 letter ruling was issued while he was Director of the Department of Revenue, Mr. J. Thomas Johnson saw the 1985 letter ruling for the first time in 1998. (Tr. p. 166).
53. Mr. Johnson was likewise unaware of the contents of the 1974 letter ruling. (Tr. p. 168).
54. Mr. George Sorenson, currently Associate Chief Counsel for Sales and Excise Taxes for the Illinois Department of Revenue, first saw the 1985 private letter ruling in 1992 during the audit of another taxpayer fueling on the Calumet River. (Tr. pp. 297, 363).
55. In January or February 1985, Mr. Sorenson was Assistant Manager of the Sales and Excise Tax Legal Division. (Tr. p. 297).
56. As Assistant Manager, Sorenson supervised the attorneys who drafted the letter rulings, as well as reviewed the letter rulings prior to being issued. (Tr. pp. 298-299).
57. As both Assistant Manager and Associate Chief Counsel, Sorenson and the attorneys he supervised drafted and promulgated regulations in the sales and excise tax area. (Tr. pp. 345-346).

58. As Associate Chief Counsel, Sorenson supervises the writing of private letter rulings that are issued by the Department with respect to sales and excise tax matters. (Tr. p. 300).

59. In his position as Associate Chief Counsel, Sorenson would receive any documents, minutes of meetings and any interdepartmental memoranda from the Director of Revenue or the General Counsel regarding policies to be addressed in either regulations or private letter rulings. (Tr. p. 347).

60. In supervising the ruling letter process, the information to be researched in formulating a response would be the relevant statute, the corresponding regulations(s), relevant case law and previous letter rulings. (Tr. p. 348).

61. The Illinois Department of Revenue Sunshine Act provides that a policy of general applicability found in an informal ruling, opinion or letter shall be adopted as a rule in accordance with the provisions of the Illinois Administrative Procedure Act. (Tr. p. 319; Taxpayer's Ex. No. 6; 20 **ILCS** 2515/3).

62. The Department has adopted regulations based upon policies set forth in a series of letter rulings to the extent that they had reached a level of general applicability, as opposed to applying solely to a single taxpayer. (Tr. p. 322).

63. A Private Letter Ruling is issued in response to an inquiry from a single taxpayer regarding a specific factual situation unique to the taxpayer posing the question. (Tr. p. 323; 2 Ill. Admin. Code, Ch. XXI, Sec. 1200.110(a)).

64. In responding to requests for private letter rulings, the Department recites the facts as presented by the taxpayer. (Tr. pp. 357-358).

65. The Notices of Tax Liability at issue were generated based upon the reasons set forth in a letter dated December 8, 1994 from the Department by George Sorenson to the taxpayer's representative. (Tr. pp. 333-334; Taxpayer's Ex. No. 23).

66. The determination that "BUBBA's" sales of fuel were taxable was based upon the rationale for the rivers bordering exemption. (Tr. pp. 335-336).

67. That is, the rationale for the exemption as stated by the Department is based upon the difficulty which sellers have in determining where the Illinois boundary is when making sales of fuel. (Tr. pp.335-336; Taxpayer's Ex. No. 23).

68. In connection with its assessment of taxpayer's sales, the Department determined that "BUBBA's" sales did not occur on waters which are part of Lake Michigan. (Tr. pp. 339).

69. Rather, as the Department determined that the Calumet River does not border Illinois, the exemption was not available to taxpayer's transactions. (Tr. p. 343).

70. The Department did not consider federal Coast Guard, commercial or navigational law as applying to the taxpayer's sales of fuel on the Calumet River as those matters were irrelevant to the application of Illinois tax laws. (Tr. pp. 340-342, 344).

71. There is no Department policy that provides that in the absence of definition in Illinois statutes, the Department follows federal law (Tr. p. 371).

72. The other private letter rulings dealing with the exemption at issue (PLR 82-0862, 84-0876, 85-0283) either denied or granted the exemption dependent upon whether or not the river at issue was a river bordering Illinois. (Tr. pp. 379-382, 386; Taxpayer's Ex. Nos. 60, 61, 62).

CONCLUSIONS OF LAW:

In the instant case the Department established its prima facie case of tax liability when the Audit Corrections and/or Determinations of Tax Due were admitted into evidence under the certificate of the Director of Revenue. (Dept. Group Ex. No. 1). (35 **ILCS** 120/4). It is incumbent upon the taxpayer to overcome the Department's prima facie case of tax liability and prove its entitlement to an exemption. A statute which exempts property or an entity from taxation must be strictly construed in favor of taxation and against exemption. All facts are to be construed and all debatable questions resolved in favor of taxation. One claiming an exemption from tax must prove clearly and conclusively its entitlement thereto. (Wyndemere Retirement Community v. Department of Revenue, 274 Ill.App.3d 455 (2nd Dist. 1995)).

The ultimate determination in the instant case is dependent upon the determination of two separate issues. First, the taxpayer asserts that it is exempt from sales of fuel otherwise taxable under the Retailers' Occupation Tax Act (35 **ILCS** 120/1 et seq.) due to a private letter ruling ("PLR") issued to "BUBBA" sometime in the period of 1961 through 1966. Secondly, the taxpayer asserts that in addition to, or in the alternative to, its first argument, section 2-5(24) of the Retailers' Occupation Tax Act and the corresponding regulation exempt "BUBBA's" sales of fuel.

Under either argument, the applicable statutory provision claimed by "BUBBA" to exempt its sales of fuel provides as follows:

> Sec. 2-5. Exemptions. Gross receipts from the sales of the following tangible personal property are exempt from the tax imposed by this Act....
> (24) Fuel consumed or used in the operation of ships, barges, or vessels that are used primarily in or for the transportation of property or the conveyance of persons for hire on rivers bordering on this State if the fuel is delivered by the seller to the purchaser's barge, ship, or vessel while

> it is afloat upon that bordering river. (35 **ILCS** 120/2-5(24)).

The pertinent regulation provides as follows:

> Section 130.315 Fuel Sold for Use in Vessels on Rivers Bordering Illinois
> Effective July 26, 1967, notwithstanding the fact that such sales are at retail, the Retailers' Occupation Tax does not apply to sales of fuel consumed or used in the operation of ships, barges or vessels which are used primarily in or for the transportation of property or the conveyance of persons for hire on rivers bordering on this State if such fuel is delivered by the seller to the purchaser's barge, ship or vessel while it is afloat upon such bordering river.

The taxpayer's sales of fuel were made to ships afloat on the Calumet River. Clearly, it can be determined that the Calumet River is not a river bordering the state of Illinois simply by looking at a map. (*See*: Taxpayer's Ex. No. 44). The taxpayer itself does not contend that the Calumet River borders this state. However, the taxpayer constructs an argument that the Calumet River is part of the Great Lakes, and two private letter rulings heretofore issued to other taxpayers provide that sales of fuel on the Great Lakes are excepted transactions under the bordering rivers exemption. In its pursuit to secure the exemption, the taxpayer contends that the private letter rulings issued to unknown taxpayers created a policy of general applicability. It is under this umbrella that "BUBBA" attempts to stand.

Regarding the assertion that the Department issued a private letter ruling directly to "BUBBA", the taxpayer does not have the letter or a copy thereof. The Department has no record of having issued a PLR to "BUBBA", either. In an effort to prove that a PLR was issued, the taxpayer called Richard Short as a witness. Mr. Short is a former Department of Revenue attorney who was promoted in 1965 to Supervisor of Rules and

Regulations in Chicago. In this position, Mr. Short supervised a group of attorneys who drafted responses to requests for letters rulings. Mr. Short claims to recall signing a private letter ruling issued to "BUBBA" wherein the taxpayer's sales of fuel were deemed exempt.

The taxpayer also presented Ms. "Elizabeth Borden" as a witness who testified as to the alleged existence of the private letter ruling. When she started working full time for the company in 1983, Ms. "Borden" testified that she learned through family members that "BUBBA" had in the past been issued an exemption from tax on its sales of fuel.

However, without a physical copy of the ruling letter, a photocopy thereof or some other documentary evidence to support the allegation of the existence of a letter ruling issued specifically to "BUBBA", this argument must fall. The law is abundant and clear that testimony alone is insufficient to rebut the Department's prima facie case. (Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203 (1st Dist. 1991)).

As an argument against this basic legal premise, in its Reply Brief the taxpayer claims that under Illinois' Secondary Evidence Rule, Mr. Short's oral testimony is sufficient to establish the existence and the content of the private letter ruling allegedly issued directly to "BUBBA". The taxpayer cites the case of Poelker v. Warrensburg-Latham Comm. Unit School Dist. No. 11, 251 Ill. App. 3d 270 (4th Dist. 1993), as support for this proposition. In Poelker, the court determined that when a party seeks to introduce secondary evidence of a writing, as opposed to best evidence in the form of an original writing, he must first establish the prior existence of the original writing, its loss, destruction or unavailability, and that he diligently tried to procure the original. In

Poelker, the court allowed oral testimony to prove the prior existence and contents of a handout concerning written safety rules since the witness was familiar with the missing document and had an independent recollection of its contents.

Of course, in Poelker the destroyed document was no more than seven years old at the time the author of the rules testified as to their substance. In the case at bar, the missing ruling letter was over 30 years old at the time Mr. Short testified as to its contents. It is rather incredulous that anyone could so distinctly recall the contents of a document drafted so many years ago. In fact, Mr. Short himself responded when asked what he said on behalf of the Department in the letter, that as it had been at least 30 years, he couldn't remember the specific language.

Additionally, in Poelker, one of the team members to whom the written rules were distributed testified that the rules had been passed out at the beginning of the 1986 season. This testimony corroborated the testimony regarding the existence of the written rules. In the case at bar, the only corroborative testimony was from "Elizabeth Borden" who never personally saw the alleged letter ruling. Rather, she merely *heard* that there was an exemption for "BUBBA"'s sales. Although the taxpayer did establish the other conditions that are requisite to allowing the introduction of secondary evidence of a writing (the loss, destruction or unavailability of the document, and that a diligent effort to procure the original was made), it is my determination that the prior existence of the letter ruling was not established. Based upon these distinctions, I do not find that the testimony of Mr. Short is sufficient as secondary evidence to establish the existence and content of the alleged private letter ruling issued to "BUBBA".

Furthermore, assuming arguendo that the Department did in fact issue a private letter ruling to "BUBBA" exempting its sales of fuel, the specific exemption at issue could not have been the basis for the exemption granted as the bordering rivers exemption was not enacted until 1967; i.e. subsequent to the timeframe in which the PLR was drafted.

86 Ill. Admin. Code 1200.11(d) specifically states that "[p]rivate letter rulings will cease to bind the Department if there is a pertinent change in statutory law, case law, or material facts." As Mr. Short testified, when a response to a request from a taxpayer for the issuance of a private letter ruling is drafted, a typical format is followed. That is, the facts as stated by the taxpayer itself are recited, the applicable rule, regulation or pertinent case law is set forth by the Department in its response, and the exemption is either then granted or denied, with a rationale delineated. Without a physical copy of the PLR, there is no way to determine what facts the taxpayer presented in its request for a letter ruling, or to what factual scenario the Department might have responded. Sheila Bauschelt is not competent to testify as to what the PLR stated as she was not even remotely involved in the business as the time of its alleged issuance. It is not at all unreasonable to assume that the facts as originally outlined by the taxpayer could be materially different than the specific facts during the taxable period. As there is no way of knowing the facts as presented and responded to, there is simply no basis on which to find that a PLR was issued to "BUBBA" and that the facts as originally stated represent the factual scenario during the taxable period. Therefore, the Department cannot be bound by the "possible" private letter ruling claimed in this matter.

A correlating argument presented by "BUBBA" is built on several legal premises, each one of which must be satisfied in order to proceed to the conclusion that the taxpayer qualifies for the rivers bordering exemption. "BUBBA" begins by contending that both case and statutory law mandate that the Department promulgate a formal rule when it issues a private letter ruling that contains a policy of general applicability. Both the Retailers' Occupation Tax Act and the Use Tax Act provide as follows:

> Whenever informal rulings, opinions, or letters contain a policy of general applicability, the Department shall formulate and adopt that policy as a rule in accordance with the Illinois Administrative Procedure Act. (35 **ILCS** 120/2-45; 35 **ILCS** 105/3-50).

The Illinois Department of Revenue Sunshine Act (20 **ILCS** 2515/3) has nearly uniform language.

The taxpayer sets forth its position by referencing two old private letter rulings: an unidentified one dated July 19, 1974 and drafted by Willard Ice, then Manager of the Regulations and Hearings Division, and PLR-850149 dated February 6, 1985, drafted by Archie Lawrence, Staff Attorney. The 1974 letter ruling provides that "[t]here is an exemption for fuel when it is sold for use in a ship and delivered into the ship while it is afloat on waters (including Lake Michigan according to an unappealed lower court decision) bordering Illinois". This same letter seems to include points in Illinois such as Navy Pier and Calumet Harbor as being either part of Lake Michigan or waters bordering Illinois in that the letter excludes the sale of supplies, stating, "[w]hen you sell supplies to the operator of the ship for use in the operation of the ship, and deliver such supplies to the operator of the ship or to the ship at a point in Illinois (such as Navy Pier in Chicago or Calumet Harbor), you incur retailers' occupation tax liability on your receipts from

such sales...". There is no mention in the letter as to where the inquirer's fuelings took place. Neither is there a cite to the referenced "unappealed lower court decision". In fact, to date, neither party has produced such decision.

Private Letter Ruling 85-0149 likewise extends the exemption at issue to sales of fuel to ships or vessels while they are afloat on the Great Lakes. It appears as though the 1985 letter ruling was drafted based upon the 1974 letter ruling as these are the only occasions wherein the Department extended the exemption beyond bordering rivers to the Great Lakes.[3]

In fact, it certainly appears that the first time that the Department specifically considered whether fuelings that transpired on the Calumet River qualified for the exemption was in a 1992 audit of another taxpayer. In that case, the Department determined that sales of fuel to vessels afloat on the Calumet River were not exempt.

[3] A careful reading of the 1985 letter ruling, however, does not necessarily suggest that the Department extended the rivers bordering exemption to fuel sales occurring on the Great Lakes. Rather, the Department was responding to an inquiry from a taxpayer that provided in part as follows: "I have been advised that it is possible to obtain a ruling from the Department that will extend this exemption to vessels which operate exclusively on one or more of the five Great Lakes engaging in interstate or international trade." The Department's response merely provides that, "[a]ssuming that the ships or vessels in which your company sells fuel are operating on the Great Lakes and is engaged in interstate commerce, your company will not incur Retailers' Occupation Tax or Use Tax on the sale of such fuel if such fuel is delivered by the seller to the purchaser's ships or vessels while they are afloat upon such Great Lakes."

In George Sorenson's December 8, 1994 letter to taxpayer's counsel (Taxpayer Ex. No. 23), Sorenson states that, "[t]he 1985 letter reflects the extension of the "bordering river" exemption to a vessel afloat on Lake Michigan but within the Illinois border and its reference to exempt sales to vessels afloat on the Great Lakes is a reference to the fact that the delivery of fuel to a vessel located anywhere on the Great Lakes outside Illinois would be exempt as a sale in interstate commerce. See, 86 Ill. Adm Code 130.605(b), enclosed." Even Mr. Johnson testified that, "... from time to time both for purposes of assuring the Illinois tax law was not in violation of the commerce clause, specific exemptions were provided to specific transactions." (Tr. p. 148). He further testified that, "[a]nd the big issue was quite often people were trying to claim exemption because the fuel was going to be used in interstate commerce regardless of where it was loaded on the vessel versus a specific provision with the exemption. And so there were regular Letter Ruling requests on that subject matter. The taxpayer quite often didn't know which exemption should apply but felt strongly that it was an exemption provided for under Illinois law." (Tr. pp. 151-152). It is certainly reasonable to conclude that the Department was merely responding to an inquiry from a taxpayer who felt he qualified for an exemption due to interstate commerce concerns, but was not certain which exemption was applicable to its situation. The Department, therefore, simply stated in the 1985 letter ruling that if a sale of fuel occurs outside of the Illinois boundary, it is exempt as a sale in interstate commerce.

The taxpayer therein paid the assessment. The only other time in which the issue has arisen concerning whether sales of fuel on the Calumet River were exempt is in the instant cause. There is absolutely no evidence that fuelings on the Calumet River were an issue other than in these two instances. In fact, Ms. "Borden" testified that she knew of no other fuel supplier selling fuel to vessels afloat on the Calumet River.

Former Revenue Director Mr. Johnson testified that it was the position of the Department to extend the exemption to the Great Lakes. However, he never issued an informational bulletin or conducted a policy meeting regarding the 1985 letter ruling, and he never discussed the contents of the letter ruling with the person who drafted it, nor that person's supervisor. In fact, he testified that he was unaware of the 1974 and the 1985 letter rulings until taxpayer's representative discussed the issue with him in 1998. In addition, George Sorenson was not aware of the 1985 letter ruling until the audit of the other taxpayer with the Calumet River issue. It would be difficult to find that there could have been a Department policy to expand the exemption beyond bordering rivers given this set of facts.

The taxpayer proffered four other private ruling letters issued between 1982 and 1985 to support its contention that the Department had a policy extending the rivers bordering exemption to the Great Lakes: 82-0919, 82-0862, 84-0876, and 85-0283. However, not one of those letter rulings mentions the Calumet River as the location of fuel sales. In fact, the letter rulings point out that the exemption was not granted in cases wherein the river was not a *river bordering* Illinois. The December 8, 1994 letter from the Department by George Sorenson to "BUBBA's" representative makes evident that the 1974 exemption extension to Lake Michigan waters bordering Illinois is the only body of

water other than a bordering river on which a delivery could take place in Illinois or a bordering state. Lake Michigan borders Illinois and Wisconsin, as well as Illinois and Indiana. The Calumet River, a distinct body of water, is not mentioned in the letter, nor does it border Illinois and another state.

There is insufficient evidence in the record to suggest that the 1974 and 1985 letter rulings create a policy of general applicability, especially since the 1985 letter ruling was premised upon the 1974 letter ruling. It is unknown who requested the latter letter ruling and where the fuelings occurred. Furthermore, as no one has ever located the "unappealed lower court decision" referenced in the 1974 letter ruling, it is even a fair inference that the premise upon which the rivers bordering exemption was expanded to the Great Lakes was faulty. Case law is replete with the axiom that the mistakes or misinformation of the Department's officers does not estop the Department from collecting the tax. (Austin Liquor Mart, Inc. v. Department of Revenue, 51 Ill. 2d 1 (1972)). In the case of Rockford Life Insurance Co. v. Department of Revenue, 112 Ill. 2d 174 (1986), the Illinois Supreme Court cited Austin Liquor Mart, *supra*, for the proposition that a public body will be estopped only when it is necessary to prevent fraud or injustice, especially when public revenues are involved. The court went further, though, and held that a change in Department policy regarding taxation of certain securities previously deemed exempt from taxation would not necessarily be more burdensome or unjust than a reexamination of a taxpayer's liability after the approval of the tax return, which had previously been deemed allowable.

Furthermore, in the case of United Air Lines, Inc. v. Mahin, 49 Ill. 2d 45 (1971), the Illinois Supreme Court refused to follow the construction of a statute as employed for

eight years by the Department of Revenue. As the Court stated, "[e]xecutive or administrative construction [of a statute] is not binding on the courts if it is erroneous...". (49 Ill. 2d at 50). Clearly, in the case at bar where there are only two letter rulings, eleven years apart, extending the exemption to ships fueling on Lake Michigan, which is well beyond the statutory and regulatory language of a bordering river, the State is not estopped from making a determination that fuelings on the Calumet River are taxable.

The fact that during the course of the audit the taxpayer was advised that if it fueled on Lake Michigan it would be exempt based upon the 1985 letter ruling does likewise not establish a policy of general applicability. This information is contrary to the law and as explained, *supra*, the Department cannot be held to such an error. Based upon the facts of the case, the Department determined that "BUBBA's" sales of fuel were taxable as they occurred on waters other than a bordering river; i.e., they transpired on the Calumet River, a distinct body of water.

Mr. Johnson proffered testimony that it in the absence of Illinois law, it was the Department's course of action to follow federal law, commercial law and other states' laws to interpret statutory, regulatory or private letter ruling terms. Other than the testimony of Mr. Johnson, there is absolutely no other evidence to this effect, nor is this position mandated by any law. In fact, this position is disputed by Mr. Sorenson, who was and continues to be privy to policies intended to be promulgated by the Department via regulation or letter ruling. (Tr. p. 347). (*See*: 5 ILCS 100/5-150(b): Declaratory rulings – Overlapping regulations.)

Case law provides that where statutory language is clear, it will be given effect. (Sparks & Wiewel Construction Co. v. Martin, 250 Ill. App. 3d 955). As the Illinois

Supreme Court stated in United Air Lines, Inc. v. Mahin,, *supra*, "[i]t is axiomatic that the words used in a statute should generally be given their plain and ordinary, or commonly accepted meaning, unless to do so would defeat the manifest intent of the legislature." (49 Ill. 2d 52). The word "border" is defined in Webster's Third New International Dictionary of the English Language Unabridged (1993) as follows: "**1a**: an outer part or edge: the part that parallels the boundary or outline of something: MARGIN. ... **2b**: a boundary line." The word "bordering" is defined in the same dictionary as "something that serves as a border: EDGING". The court in United Air Lines, *supra*, further states that "... there is no rule of construction which permits a court to say that the legislature did not mean what the plain language of a statute imports". (49 Ill. 2d at 52). The plain and ordinary meaning of bordering rivers is what the Department applied in "BUBBA"'s audit.

In addition, contrary to Mr. Johnson's testimony, it is clear that the Department in fact is not bound to follow federal law in determining whether an exemption is applicable. For example, case law supports Sorenson's example that the Department does not consider the fact that a corporation has exempt status for federal income tax purposes (26 U.S.C. sec. 501(c)(3)) relevant to whether it is used for charitable purposes, and thus qualifies for an exemption as a charitable organization for real estate tax purposes in Illinois. Even an exemption from Illinois sales or use taxes is not relevant to whether a taxpayer would qualify for an Illinois property tax exemption. (*See*: People ex rel. v. Hopedale Medical Foundation, 46 Ill. 2d 450 (1970); Application of Clark, 80 Ill. App. 3d 1040 (2nd Dist. 1980)).

Compliance with standards relevant to federal tax exemptions does not, therefore, *ipso facto* establish that Illinois tax exemption requisites are met. As Sorenson stated, in a situation wherein a state tax exemption is at issue, the Department is not obligated to follow federal law. Therefore, unless otherwise mandated by statute or case law, the Department is not required to adhere to federal maritime rules and definitions enacted for purposes of navigation and safety when a state tax exemption is at stake and the language of the statute is clear.

The taxpayer cites the case of Union Electric Company v. Department of Revenue, 136 Ill. 2d 385 (1990), for the proposition that contrary to the Department's position, even a single letter ruling can create a policy of general applicability that is binding on the Department. The Union Electric case can be distinguished from the instant case in that the court held that the letter ruling at issue in Union Electric clearly contained a policy of general applicability. Certainly, in this case, the two letter rulings relied upon by "BUBBA" do not clearly contain a policy of general applicability in that, in Union Electric, the letter ruling at issue was precise in its delineation of the procedural steps necessary to be taken by *any taxpayer* in order for certain transactions to be deemed exempt.

In order to argue that the two letter rulings relied upon by "BUBBA" are similar to that in Union Electric, the taxpayer introduced much evidence, including testimony from an opinion witness, to interpret what the instant letter rulings mean. To arrive at the desired conclusion that "BUBBA's" sales are exempt, the taxpayer attempts to prove that its sales of fuel, that undisputedly take place on the Calumet River, qualify for an exemption under the bordering rivers exemption because the fuel sales actually occur on

Lake Michigan, and two letter rulings exempt fuel sales occurring on the Great Lakes. The very necessity of such explanatory testimony calling for deductions to be made therefrom, means that the letter rulings at issue clearly reflect a policy that fuelings on the Calumet River are not exempt. Therefore, Union Electric does not apply.

Furthermore, in Union Electric, the court noted that the letter ruling at issue reflected the policy which was in effect during the time period at issue therein. That is, the letter ruling therein was issued on March 5, 1981 and the audit period at issue was July 1, 1981 through June 30, 1984. In the case at bar, the letter rulings were issued in 1974 and 1985, while the audit period is January 1992 through March 1995. Particularly since the 1985 letter ruling was based upon the 1974 letter ruling, which, as it appears, was erroneously issued, the audit period is many years after its issuance. It is also noteworthy that Union Electric was decided prior to the promulgation of 2 Ill. Admin. Code Ch. XXI, Sec. 1200.110 pertaining to Private Letter Rulings. Section 1200.100(a) specifically provides that "[l]etter rulings are binding on the Department only as to the taxpayer who is the subject of the request for ruling." "BUBBA" cannot latch onto letter rulings that clearly have no applicability to its situation to argue that it is exempt from a particular tax application.

More on point is the case of Container Corp. v. Wagner, 293 Ill. App. 3d 1089 (1st Dist. 1987). The court found in that case that the private letter rulings and internal memorandum relied upon by the taxpayer did not in fact reflect a policy of general applicability which was in effect during the tax period at issue. The taxpayer attempted to show through three private letter rulings and an internal Department memorandum that there was a policy of not assessing Retailers' Occupation Tax on the sale of paint thinners

to manufacturers who use them in painting their finished products because they are sales for resale. However, the Department produced 17 private letter rulings that found that paint thinner, solvents and other like property that are consumed in the manufacturing process and did not become part of the finished products, were taxable. The Department also produced an internal Department memorandum which indicated that there was disagreement within the Department regarding the taxability of paint thinners during and subsequent to the taxable period. The court determined that what was clear was that even within the Department it was not certain whether paint thinner should be taxed, although in most instances, the Department determined that it was taxable. There was not a clear policy exempting paint thinner from tax, and in fact, had the taxpayer been able to show the existence of such a policy, it would have been contrary to established precedent and to existing Department regulations.

That is precisely the situation herein. "BUBBA" failed to establish a clear policy that fuelings on Lake Michigan were exempt. Furthermore, even if "BUBBA" had been successful in its attempt to establish such a policy, it would be contrary to the statute and regulations in existence at the time of the audit, and would therefore be invalid. Although "BUBBA" offered several other letter rulings into evidence, none of them dealt with the facts at issue; i.e., fuelings that take place on the Calumet River. In fact, the ruling letters simply confirmed that in order to qualify for the exemption, the river must be bordering Illinois. Lastly, the fact that prior to the "BUBBA" audit, the Department taxed another taxpayer's sales of fuel on the Calumet River reflects that there was no policy under which "BUBBA" could claim exempt sales.

Taxpayer's theory in this case requires the finding that the 1974 and 1985 private letter rulings establish a policy of general applicability that the exemption applies to sales on the Great Lakes and, therefore, on the Calumet River. Further, the taxpayer must be able to connect the Calumet River as a Great Lake. To this end, the taxpayer argues in the next stage that the Calumet River is part of Lake Michigan, and thus, part of the Great Lakes, and therefore, the exemption applies to it as well as to taxpayers who sell fuel to ships on the Great Lakes. As I have already determined that the 1974 and 1985 letter rulings do not establish a policy of exempting fuelings on Lake Michigan and the Great Lakes, the link to fuelings on the Calumet River cannot be established. However, for the sake of argument, I will address whether in fact the Calumet River is part of the Great Lakes as asserted by "BUBBA".

Taxpayer's witness, Captain "Horatio Hornblower", testified that based upon his experience as an officer in the United States Coast Guard for 24 years he has a thorough understanding and knowledge of the federal rules and regulations that the Coast Guard enforces in, on and under the navigable waters of the United States. During the period of 19xx to 19xx Captain "Hornblower" was the Captain of the Port of Chicago. As Captain of the Port, he had jurisdiction over certain waters, including waters north of the Thomas J. O'Brien lock, the Calumet River and Lake Calumet. As Captain of the Port, he was responsible for commercial shipping in the waters in his jurisdiction, and was aware of the custom and usage of these waters as treated by both the Coast Guard and those involved in the commercial shipping industry. Captain "Hornblower" testified that the Coast Guard, as well as those involved in the commercial shipping industry, consider the area wherein the fuelings in the case at bar took place to be part of the Great Lakes. In

addition, Captain "Hornblower" testified that it would be a violation of the federal licensing statute for a vessel operating north of the Thomas J. O'Brien lock (i.e., Calumet Harbor, the waters wherein "BUBBA's" fuelings transpired) to operate a commercial vessel without a Great Lakes license. Those vessels operating south of the lock, however, must have a Western Rivers license. As Captain of the Port of Chicago, "Hornblower" had to be familiar with the federal definition of waters within his jurisdiction, including the definition of Great Lakes, which includes the waters at issue per the navigation statute, 33 U.S.C. Sec. 2003(m).

As impressive a figure as Captain "Hornblower" may be in his stature as a retired U.S. Coast Guard officer, his testimony regarding the treatment of the waters at issue by the Coast Guard, as well as those in the commercial shipping industry, as part of the Great Lakes, is not relevant. I determined, *supra*, that there is no need to look outside Illinois law for a definition of "rivers bordering".

The evidence indicates that the exemption at issue was created to avoid concerns over interstate commerce violations, to give Illinois retailers equal footing with out-of-state retailers selling to Illinois residents and to aid in determining tax liability when sales are made on rivers bordering two states. Captain "Hornblower" acknowledged that all of "BUBBA's" fuelings occurred within Illinois. This would alleviate concerns over interstate commerce violations, as well as misgivings regarding the state wherein fuelings take place. Furthermore, the maritime issues of safety, navigation and licensing have nothing to do with the purposes for which this exemption from Retailers' Occupation Tax was enacted.

The taxpayer has therefore failed in its attempt to prove its position by linking several propositions, the validity of each one dependent upon soundness of the preceding position. Even assuming, *arguendo*, that the 1974 and 1985 letter rulings did create a policy of general applicability, the taxpayer did not prove that the waters of the Calumet River are in fact Lake Michigan waters. Rather, the Calumet River is a distinct body of water.

Nor do I find compelling taxpayer's argument that the Department violated the Illinois Department of Revenue Sunshine Act (20 **ILCS** 2515/3). The Sunshine Act provides that,

> Whenever such informal ruling, opinion or letter contains any policy of general applicability, the Department shall formulate and adopt such policy as a rule in accordance with the provisions of the Illinois Administrative Procedure Act.

However, as stated previously herein, it is my determination that the 1974 and 1985 private letter rulings do not contain a policy of general applicability. The provisions of the Illinois Administrative Procedure Act ("APA") (5 **ILCS** 100/1-1 et seq.) concerning rulemaking were not, therefore, violated by the Department. In fact, the APA specifically excepts from the definition of "rule" informal advisory rulings, under which private letter rulings qualify. (5 **ILCS** 100/1-70). As there is no policy of general applicability, case law supports the determination that the APA was not violated. In Stutzke v. Illinois Commerce Commission, the court held that "... when an administrative agency interprets statutory language as it applies to a particular set of facts, the rulemaking procedure of the Procedure Act is not involved." (242 Ill. App. 3d 315, 319 (4th Dist. 1993)). Rather, as stated in Sparks & Wiewel Construction Co., "[w]hen an

administrative agency interprets statutory language as it applies to a particular set of facts, adjudicated cases are a proper alternative method of announcing agency policies." (250 Ill. App. 3d 955, 968 (4th Dist. 1993)). In the instant case, the Department determined that the exemption did not apply to "BUBBA's" situation. The Department's position concerning the factual scenario in "BUBBA" is clear from its assessment and the ensuing hearing. That is, "BUBBA's" sales of fuel that occur on the Calumet River are taxable sales.

Likewise, I do not concur with "BUBBA's" depiction of its situation as presenting a "rare circumstance" necessitating the abatement of taxes in accordance with the Taxpayer's Bill of Rights. The taxpayer contends that it was entitled to rely on the private letter ruling issued until it was effectively revoked by the Department at the Informal Conference Unit ("ICU") review conference held on June 1995.[4] Specifically, section 1200.110(d) of the Department's regulations provides as follows:

> In certain rare circumstances, it will be necessary for the Department to specifically revoke a private letter ruling previously issued to a taxpayer. In the case of such a revocation, the taxpayer will incur no liability for any tax, penalty or interest as a result of reliance on the ruling up to the date of the issuance of the revocation of the ruling (See Section 4 of the Taxpayer's Bill of Rights Act (Ill. Rev. Stat. 191, ch. 120 par. 2304) [20 ILCS 2520/4]

The Taxpayer's Bill of Rights referenced in the above cited regulation states that:

> The Department of Revenue shall have the following powers and duties to protect the rights of taxpayers:
> (c) To abate taxes and penalties assessed based upon erroneous written information or advice given by the Department. (20 **ILCS** 2520/4(c)).

[4] A taxpayer may request that the Informal Conference Unit review the proposed audit liability. This is part of the audit process and will be granted only when a valid, controversial audit issue is identified. (*See*: 20 **ILCS** 2505/39b20.1).

As it is my determination that the taxpayer failed to prove the existence of a private letter ruling issued to it directly, "BUBBA" cannot assert that it relied upon “erroneous written information or advice”. Furthermore, as there is no proof of written advice, there can be no revocation of the same. In short, this argument lacks merit and need not be considered further.

"BUBBA" also argues that the Department violates the Uniformity Clause of the Illinois Constitution by differentiating between a taxpayer fueling ships or vessels on a river bordering Illinois and a taxpayer fueling on a lake bordering Illinois. The taxpayer contends that in both situations the taxpayer is fueling ships on a body of water bordering Illinois. Article IX, Section 2 of the Illinois Constitution of 1970 provides:

> In any law classifying the subjects or objects of nonproperty taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly....

In order to advance its uniformity challenge, the taxpayer must fall back on its argument that a policy of general applicability has been established extending the exemption to the Great Lakes, and furthermore, that the Calumet River is part of the Great Lakes. In fact, the Calumet River is not a bordering body of water; rather, it is located entirely within the state of Illinois. There is no possibility of confusion as to which state a fueling takes place, nor is there any chance of competition from out of state sellers. In fact, the taxpayer was treated uniformly with the one other taxpayer fueling on the Calumet River. There is simply no violation of the Uniformity Clause.

In conclusion, the taxpayer herein has failed to rebut the Department’s prima facie case of tax liability and to prove its entitlement to the rivers bordering exemption. Case law is clear and consistent that “[s]tatutes granting exemptions from tax are construed

strictly in favor of taxation", "and [a]ny doubts concerning the applicability of an exemption will be resolved in favor of taxation". (Craftmasters, Inc. v. Department of Revenue, 269 Ill. App. 3d 934, 939-940 (4th Dist. 1995)). In addition, the exemption claimant must clearly and convincingly prove entitlement to the exemption. (United Air Lines, Inc. v. Johnson, 84 Ill. 2d 446 (1981)).

Certainly, this is not a case wherein it is clear that the taxpayer is entitled to the exemption. Rather, in the instant case it is my determination that "BUBBA" failed to prove the existence of a letter ruling issued directly to the taxpayer. Also, "BUBBA" failed to prove that the two letter rulings upon which it relies so heavily prove a policy of general applicability, and that the Calumet River is part of Lake Michigan. Having failed in these proofs, any and all additional arguments concerning violation of the Sunshine Act, the APA and the Uniformity Clause fall.

RECOMMENDATION:

Based upon the foregoing, it is my recommendation that NTL Nos. SF-190000000000000 and SF-190000000000001 be confirmed in their entirety.

Date: 8/1/99

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Mary Japlon
Administrative Law Judge